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Opinion following remand from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RAYMOND EDWARDS II, Plaintiff and Appellant, v. ARTHUR ANDERSEN LLP, Defendant and Respondent.	B178246 (Los Angeles County Super. Ct. No. BC294853)

APPEAL from a judgment of the Superior Court of Los Angeles County, Andria K. Richey, Judge. Affirmed in part and reversed in part, and remanded for further proceedings.

Law Offices of Richard A. Love, Richard A. Love and Beth A. Shenfeld, for Plaintiff and Appellant.

Latham & Watkins, Wayne S. Flick and Yury Kapgan, for Defendant and Respondent.

INTRODUCTION

We reconsider this appeal on remand from the California Supreme Court after its decision in *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937 (*Edwards*). Plaintiff and appellant Raymond Edwards II was hired by Arthur Andersen LLP (Andersen) in 1997. At the time he was hired, Edwards was required by Andersen to execute a noncompetition agreement. Andersen eventually went out of business and sold its Los Angeles tax practice, of which Edwards was a part, to HSBC USA Inc. (HSBC). As a condition of hire with HSBC, Andersen allegedly required that Edwards obtain a release of the 1997 noncompetition agreement. To do so, Edwards was obliged to execute a "Termination of Non-Compete Agreement" (TONC), which contained a broad release of claims against Andersen, as well as other terms favorable to Andersen. Edwards refused to sign and his employment offer with HSBC was withdrawn.

Edwards sued Andersen for, inter alia, intentional interference with prospective economic advantage and violation of the Cartwright Act. Andersen's demurrer to the Cartwright Act claim was sustained on the ground Edwards lacked standing to sue. The intentional interference claim was dismissed as a matter of law before trial, based upon the trial court's ruling that both the 1997 noncompetition agreement and the 2002 TONC were valid.

In our initial opinion in this matter (*Edwards v. Arthur Andersen LLP* (2006) 142 Cal.App.4th 603, review granted Nov. 29, 2006, S147190), we held as follows: (1) the noncompetition agreement was invalid under Business and Professions Code section 16600[1] and, to the extent Andersen demanded execution of the TONC as consideration for release from the noncompetition agreement, such action constituted an independently wrongful act; (2) the TONC purported to

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[1] All further undesignated statutory references are to the Business and Professions Code.

waive Edwards's Labor Code section 2802 indemnity rights in violation of public policy, and requiring execution of the waiver constituted an independently wrongful act; (3) a nondisparagement provision contained in the TONC did not violate Labor Code section 1102.5; (4) Andersen failed to show, as a matter of undisputed fact, that Edwards lacked a prospective economic relationship with HSBC or that HSBC, rather than Andersen, insisted Edwards execute the TONC as a condition of employment; and (5) Andersen's demurrer to Edwards's Cartwright Act cause of action was properly sustained.

Edwards agreed with our analysis on the first point, disagreed with our analysis on the second (*Edwards, supra,* 44 Cal.4th at pp. 945-955), and did not grant review on the third, fourth, and fifth issues. The opinion we now file follows the holdings in *Edwards* on the first two issues, and is substantially the same as our original opinion in regard to the third, fourth, and fifth issues.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Edwards's employment with Andersen and the noncompetition agreement.*

In January 1997, Edwards, a certified public accountant, was hired as a Tax Manager by Andersen's Los Angeles office. Andersen's employment offer was made contingent upon Edwards's signing a noncompetition agreement, which prohibited him from working for or soliciting certain Andersen clients for specified periods following his termination. The relevant provisions of that agreement were as follows: "If you leave the Firm, for eighteen months after release or resignation, you agree not to perform professional services of the type you provided for any client on which you worked during the eighteen months prior to release or resignation. This does not prohibit you from accepting employment with a client. [¶] For twelve months after you leave the Firm, you agree not to solicit (to perform professional services of the type you provided) any client of the office(s) to which you were assigned during the eighteen months preceding release

or resignation. [¶] You agree not to solicit away from the Firm any of its professional personnel for eighteen months after release or resignation."

2. *Sale of Andersen assets to HSBC, the TONC, and withdrawal of Edwards's employment offer with HSBC.*

Between 1997 and 2002, Edwards continued working for Andersen, moving into the firm's private client services practice group, where he handled income, gift, and estate tax planning for individuals and entities with large incomes and net worth. During this period he was promoted to senior manager and was on track to become a partner. In March 2002, Andersen was indicted for obstruction of justice in connection with the investigation of Enron Corporation by the Securities and Exchange Commission. (See generally *Arthur Andersen LLP v. United States* (2005) 544 U.S. 696.) In April 2002, Andersen began selling off its practice groups to various entities. In May 2002, Andersen internally announced that HSBC, through a new subsidiary, Wealth and Tax Advisory Services (WTAS), would purchase a portion of Andersen's Los Angeles tax practice, including Edwards's group. Allegedly as a condition of the HSBC transaction closing, Andersen required that all Andersen managers, including Edwards, execute the TONC in order to obtain employment with HSBC. The TONC was crafted by Andersen. It required employees to, inter alia, (1) voluntarily resign from Andersen; (2) release Andersen from "any and all" claims, including "claims that in any way arise from or out of, are based upon or relate to Employee's employment by, association with or compensation from" Andersen; (3) continue indefinitely to preserve confidential information and trade secrets except as otherwise required by a court or governmental agency; (4) refrain from disparaging Andersen or its related entities or partners; and (5) cooperate with Andersen in connection with any investigation of, or litigation against, Andersen. In exchange, Andersen would agree to accept Edwards's resignation, agree to Edwards's "employment by or affiliation with" HSBC, and release Edwards from the foregoing provisions of the 1997 noncompetition agreement.

HSBC extended an employment offer to Edwards, contingent upon his execution of the TONC. Edwards was informed by Andersen that he had to sign the TONC in order for him to be employed by HSBC. Edwards signed and returned HSBC's written employment offer, but refused to sign the TONC. Edwards's reasons for refusing to sign the TONC included that he believed it required him to give up his right to indemnification, which he felt was particularly important in light of the government's investigation into the company. Edwards also believed several of Andersen's clients for whom he did work would sue Andersen and name him as a defendant, and if that were the case he wished to ensure he retained his right to indemnification. As a result of his refusal to sign the TONC, HSBC withdrew its employment offer. Andersen terminated Edwards's employment and withheld severance benefits.

In August 2002, Andersen announced it would cease practicing public accounting in the United States. Andersen's California accounting license was revoked in September 2002.

3. *Edwards's lawsuit and the trial court's rulings.*

On April 30, 2003, Edwards filed a complaint against Andersen, HSBC, and WTAS. The complaint alleged, inter alia, causes of action for intentional interference with prospective economic advantage and anticompetitive business practices under the Cartwright Act (§ 16700 et seq.). As to the former, Edwards alleged that the Andersen noncompetition agreement violated section 16600. Further, he alleged that the TONC's release provision violated Labor Code sections 2802 and 2804.

The trial court sustained defendants' demurrers to the Cartwright Act claim without leave to amend on the ground Edwards lacked standing to bring the claim. It then denied Andersen's subsequent motion for summary adjudication on Edwards's intentional interference with prospective economic advantage claim, concluding triable issues of fact existed regarding "the meaning of the agreements," and whether the noncompetition agreement protected trade secrets.

All remaining claims against Andersen were dismissed via summary adjudication and are not at issue here. Edwards settled with the remaining parties prior to trial.

Shortly before trial, Andersen moved pursuant to Code of Civil Procedure sections 598 and 1048, subdivision (b), to sever trial on the issue of the enforceability of the noncompetition agreement and the TONC.[2] Andersen urged that the enforceability of the agreements presented pure questions of law for adjudication by the trial court, and contended that the provisions of both the TONC and the 1997 noncompetition agreement were lawful. Over Edwards's objection, the trial court granted the motion to sever and, at the same hearing, ruled in favor of Andersen on the merits. It heard arguments from the parties, but did not take evidence. It determined, based primarily upon its interpretation of the contractual provisions, that as a matter of law (1) the noncompetition agreement fell within a "narrow restraint" exception to section 16600; (2) the noncompetition agreement provision prohibiting Edwards from soliciting Andersen employees was lawful; (3) the nondisparagement clause was not illegal; and (4) the TONC did not specifically release Edwards's indemnity rights. Accordingly, it granted judgment for Andersen.

4. *Appeal of the trial court's rulings.*

Andersen appealed to this court. In our initial opinion, we concluded Andersen's noncompetition agreement violated section 16600 unless it fell within an exception to the statute, an issue which had not been adjudicated below. Requiring Edwards to execute the TONC as consideration for release from the

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[2] Pursuant to Code of Civil Procedure sections 598 and 1048, subdivision (b), respectively, a trial court may order trial of an issue to precede trial of another issue, and may order separate trials of separate issues. (See generally 1 Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2008) ¶¶ 4:342, 4:375, pp. 4-82.2, 4-84.) Issues of law must generally be tried by the court. (Code Civ. Proc., §§ 591, 592.)

noncompetition agreement constituted an independently wrongful act for purposes of Edwards's intentional interference with prospective economic advantage claim. We likewise held that the TONC purported to waive Edwards's Labor Code section 2802 indemnity rights in violation of public policy, thereby constituting a second independently wrongful act. We rejected Edwards's contention that the TONC's nondisparagement provision violated Labor Code section 1102.5. We rejected Andersen's argument that, as a matter of law (1) Edwards lacked a prospective economic relationship with HSBC, and (2) HSBC, rather than Andersen, insisted that Edwards execute the TONC as a condition of employment. Finally, we concluded that Andersen's demurrer to Edwards's Cartwright Act cause of action was properly sustained.

As noted *ante*, *t*he California Supreme Court affirmed our ruling in part and reversed in part, and remanded for further proceedings consistent with its opinion. (*Edwards*, *supra*, 44 Cal.4th at p. 955.)

DISCUSSION

1. *The intentional interference with prospective economic advantage claim.*

We independently review the trial court's ruling on the prospective economic advantage claim. (See *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881, 893, fn. 6; *McCrary Construction Co. v. Metal Deck Specialists, Inc.* (2005) 133 Cal.App.4th 1528, 1535; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1126.)

The elements of a claim for intentional interference with prospective economic advantage are: (1) an economic relationship between plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) an intentional act by the defendant, designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the defendant's wrongful act. (*Edwards, supra,* 44 Cal.4th at p. 944; *Korea Supply Co. v. Lockheed Martin*

Corp. (2003) 29 Cal.4th 1134, 1153-1154.) "The plaintiff must also prove that the interference was wrongful, independent of its interfering character." (*Edwards, supra*, at p. 944; *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393.) An act is independently wrongful if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable standard. (*Edwards, supra*, at p. 944; *Korea Supply Co., supra,* at p. 1159 & fn. 11; *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1145.) The plaintiff need not prove that the defendant acted with the specific intent or purpose of disrupting the plaintiff's prospective economic advantage, as long as the defendant knew the interference was certain or substantially certain to occur as a result of its action. (*Korea Supply Co., supra,* at p. 1153.)

At issue here is the third element of the tort. We consider whether Andersen's demand for consideration to release Edwards from the covenant not to compete, or its insistence on his execution of the waiver and anti-disparagement provisions of the TONC, may qualify as independently wrongful acts.

a. *The noncompetition agreement was invalid under section 16600 and therefore requiring consideration to release Edwards from it constitutes an independently wrongful act.*

Under the common law, as is still true in many states today, restraints on the practice of a profession, trade, or business are valid if reasonable. (*Edwards, supra*, 44 Cal.4th at p. 945; *Hill Medical Corp. v. Wycoff* (2001) 86 Cal.App.4th 895, 900-901; *Bosley Medical Group v. Abramson* (1984) 161 Cal.App.3d 284, 288.) California, however, rejected this approach in 1872, upon enactment of the Civil Code. (*Edwards, supra,* at p. 946.) California's policy favoring open competition is embodied in section 16600. That section states: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The chapter excepts noncompetition agreements in the sale or dissolution

of corporations (§ 16601), partnerships (§ 16602), and limited liability corporations (§ 16602.5).[3] (*Edwards, supra,* at pp. 945-946.)

Edwards reiterated that under the statute's plain meaning, an employer cannot by contract restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the exceptions to the rule. (*Edwards, supra,* 44 Cal.4th at pp. 946-947.) *Edwards* rejected the notion that a noncompetition agreement is permissible under California law if it is merely a reasonable limitation or narrow restraint that does not completely prohibit the employee from engaging in his or her trade, business, or vocation. (*Id.* at pp. 947, 948-950.) "Noncompetition agreements are invalid under section 16600 in California even if narrowly drawn, unless they fall within the applicable statutory exceptions of section 16601, 16602, or 16602.5." (*Edwards, supra,* at p. 955.)

As we originally held and as *Edwards* affirmed, Andersen's noncompetition agreement was therefore invalid. (*Edwards, supra,* 44 Cal.4th at p. 955.) The first challenged clause prohibited Edwards, for an 18-month period, from performing professional services of the type he had provided while at Andersen, for any client on whose account he had worked during 18 months prior to his termination. The second challenged clause prohibited Edwards, for a year after termination, from "soliciting," defined by the agreement as providing professional services to any client of Andersen's Los Angeles office. While the noncompetition clause was circumscribed in time and scope, it nonetheless

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[3] We do not address the so-called trade secret exception to section 16600 (see *ReadyLink Healthcare v. Cotton* (2005) 126 Cal.App.4th 1006, 1022; *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1462, 1464; *D'Sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 935). That issue was not considered below, and Edwards does not contend the provisions of the noncompetition agreement prohibiting him from recruiting Andersen's employees violated section 16600. (*Edwards, supra,* 44 Cal.4th at p. 946, fn. 4.)

"restricted Edwards from performing work for Andersen's Los Angeles clients and therefore restricted his ability to practice his accounting profession." (*Edwards, supra*, at p. 948; *Thompson v. Impaxx, Inc.* (2003) 113 Cal.App.4th 1425, 1429.) The agreement did not fall within one of the statutory exceptions to section 16600.

Because the noncompetition agreement was invalid, Andersen's alleged action of demanding execution of the TONC as consideration for release of the noncompetition agreement could constitute an independently wrongful act for purposes of the third element of Edwards's intentional interference with prospective economic advantage claim. (*Edwards, supra*, 44 Cal.4th at p. 950.) "[T]o the extent Andersen demanded Edwards execute the TONC as consideration for release of the invalid provisions of the noncompetition agreement, it could be considered a wrongful act for purposes of his claim for interference with prospective economic advantage. An employer 'cannot lawfully make the signing of an employment agreement, which contains an unenforceable covenant not to compete, a condition of continued employment . . . . [A]n employer's termination of an employee who refuses to sign such an agreement constitutes a wrongful termination in violation of public policy.' [Citation.]" (*Ibid.*; *D'Sa v. Playhut, Inc.*, *supra*, 85 Cal.App.4th at p. 929; cf. *Baker Pacific Corp. v. Suttles* (1990) 220 Cal.App.3d 1148, 1150-1151.)

In its original briefing in this court, Andersen argued that one clause of the noncompetition agreement was not challenged, i.e., Edwards's agreement "not to solicit away from the Firm any of its professional personnel for eighteen months after release or resignation," (the "anti-raiding" provision.)[4] (See generally *Loral Corp. v. Moyes* (1985) 174 Cal.App.3d 268, 280 [anti-raiding provision was not

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[4] The TONC did not purport to release Edwards from a provision of the noncompetition agreement prohibiting him from removing, retaining, copying, or using Andersen's or clients' property or confidential, privileged, or proprietary information. Therefore, the confidentiality provision does not figure into our analysis.

invalid under section 16600].) Andersen theorized that it was entitled to consideration for releasing Edwards from the anti-raiding provision, even if the noncompetition provisions were invalid; therefore its insistence on the TONC was proper. Andersen pointed out that the trial court concluded "while Andersen was out there trying to sell a portion of its businesses to folks, [the anti-raiding] provision still had some value. Not much, I don't know, but some."

As we noted in our original opinion, it is not clear that the trial court's assumption about the value of the anti-raiding provision, made in an evidentiary vacuum, was correct. A contract is valid even if supported by insignificant consideration, and the giving up of a legal right may constitute sufficient consideration. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §§ 205, 211, pp. 239-240, 246-247.) However, "[i]t is well settled that something which is completely worthless cannot constitute a valid consideration. [Citations.]" (*Grant v. Aerodraulics Co.* (1949) 91 Cal.App.2d 68, 76; *Walters v. Calderon* (1972) 25 Cal.App.3d 863, 874; 1 Witkin, *supra*, § 205, pp. 239-240.) Andersen was going out of business and selling off its practice groups. As it was ceasing operations, it is unclear whether the anti-raiding provision retained any value. (See generally *Cubic Corp. v. Marty* (1986) 185 Cal.App.3d 438, 448 [the adequacy of consideration is to be determined in light of the conditions existing at the time a contract is made].)

Assuming arguendo the anti-raiding provision retained some minimal value at the relevant time period, we disagree with the implicit assumption that the invalid noncompetition provisions should be severed from the anti-raiding provision. An employer cannot lawfully make an employee's signing of an employment agreement containing an unenforceable covenant not to compete a condition of continued employment, "even if such agreement contains choice of law or severability provisions which would enable the employer to enforce the other provisions of the employment agreement." (*D'Sa v. Playhut, Inc.*, *supra*, 85 Cal.App.4th at p. 929.) At best, the anti-raiding provision had minimal value,

given Andersen's rapid demise. HSBC, the purchaser of Andersen's Los Angeles tax practice, could have had no real interest in Andersen employees being released from the anti-raiding provision, which applied only to prevent former Andersen employees from soliciting current *Andersen* employees, not HSBC employees. On the other hand, HSBC could, and allegedly did, have an interest in its prospective employees being released from the noncompetition provisions. By using the TONC as the instrument to release *both* the noncompetition and anti-raiding provisions, Andersen could ensure it would be able to insist on the TONC as a condition of the sale. Severing the noncompetition and anti-raiding provisions under these circumstances would not effectuate the public policy contained in section 16600.

In any event, Andersen did not establish that it offered to release Edwards from the invalid provisions of the noncompetition agreement without consideration. Edwards allegedly was required to sign the TONC in order to free him from the noncompetition provisions, as well as the anti-raiding provision. Andersen cannot be relieved of liability on the ground that if it had sought consideration for the anti-raiding provision only, Edwards would have no grounds to object. (Cf. *Thompson v. Impaxx, Inc.*, *supra*, 113 Cal.App.4th at p. 1431.)

b. *The TONC's waiver provision was not per se unlawful; however, it is a question of fact whether Andersen's conduct proves an exception to the general rule.*

The TONC contained a broad release in favor of Andersen. Subdivision (1)(d) of the TONC provided that Edwards released and discharged Andersen from "any and all actions, causes of action, claims, demands, debts, damages, costs, losses, penalties, attorneys' fees, obligations, judgments, expenses, compensation or liabilities of any nature whatsoever, in law or equity, whether known or unknown, contingent or otherwise, that Employee now has, may have ever had in the past or may have in the future against any of the Released Parties by reason of any act, omission, transaction, occurrence, conduct, circumstance,

condition, harm, matter, cause or thing that has occurred from the beginning of time up to and including the date hereof, including, without limitation, claims that in any way arise from or out of, are based upon or relate to Employee's employment by, association with or compensation from [Andersen] or any of its affiliated firms, except for claims (i) arising out of [Andersen's] obligations set forth in this Agreement or (ii) for any accrued and unpaid salary or other employee benefit or compensation owing to Employee as of the date hereof." The trial court concluded this provision was a typical broad release that did not purport to waive Edwards's indemnity rights, which were nonwaivable in any event.

Labor Code section 2802, subdivision (a), requires an employer to indemnify an employee for all expenses and losses incurred in direct consequence of the discharge of his or her duties.[5] (*Edwards, supra,* 44 Cal.4th at p. 951.) Labor Code section 2804 voids any agreement to waive the protections of Labor Code section 2802 as against public policy.[6] (*Edwards*, *supra*, at p. 951.) All contracts that waive an employee's right to indemnification are therefore null and void. (*Ibid.*) "Thus, indemnity rights are nonwaivable, and any contract that does purport to waive an employee's indemnity right would be contrary to the law and therefore unlawful to that extent." (*Id.* at pp. 951-952, fn. omitted.)

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[5] That section provides: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful."

[6] Labor Code section 2804 provides: "Any contract or agreement, express or implied, made by any employee to waive the benefits of this article or any part thereof, is null and void, and this article shall not deprive any employee or his personal representative of any right or remedy to which he is entitled under the laws of this State."

In construing the challenged provision of the TONC, *Edwards* concluded the waiver provision's language was disputed and uncertain. (*Edwards, supra,* 44 Cal.4th at p. 953.) The provision did not expressly reference indemnity rights. *Edwards* reasoned that where a contract is capable of two constructions, that which makes the contract lawful, operative, definite, reasonable, and capable of being carried into effect is preferred to an interpretation that will make it void. (*Id.* at p. 954.) Further, when construing an instrument, a court is not to " 'insert what has been omitted, or to omit what has been inserted . . . .' " (*Ibid.*) With these principles in mind, *Edwards* concluded that the TONC did "not encompass nonwaivable statutory protections, such as the employee indemnity protection of Labor Code section 2802." (*Edwards, supra,* at p. 954.) So construed, the TONC did not violate Labor Code section 2804, and was neither unlawful nor null and void. (*Ibid.*)

Edwards also noted that, even ignoring the aforementioned principles of contract interpretation, the language releasing " 'any and all' " claims did not implicate Edwards's nonwaivable right to indemnity. (*Edwards, supra,* 44 Cal.4th at p. 954.) *Edwards* explained, "Andersen contends it did not except indemnity rights from the release because it was aware that under Labor Code section 2804, such rights are statutorily nonwaivable. Andersen asserts essentially that such an exception was legally unnecessary. California case law arguably supports Andersen's contention. ' " '[A]ll applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated.' [Citation.]" ' [Citations.] This means that when we interpret the TONC, we could presume that Andersen knew Edwards's indemnity rights were statutorily nonwaivable. It also means we may treat the TONC as if it expressly includes the substance of Labor Code section 2804: that no employee's right to indemnification, to which he or she is entitled under the law, can be waived. [Citation.] Therefore, the waiver of 'any

and all' claims would not encompass the right to indemnification, because we treat the TONC as expressly incorporating the law that the employee cannot waive that right." (*Edwards, supra,* at pp. 954-955, fn. omitted.) Thus, the waiver provisions of the TONC were not per se unlawful.

Edwards observed, however, that the fact the TONC's waiver provisions were not per se unlawful did not necessarily preclude Edwards from proving, as a factual matter, that Andersen committed an independently wrongful act. *Edwards* explained, "Our holding that contracts ordinarily are presumed to incorporate statutory requirements and that the TONC here was not per se unlawful, does not preclude Edwards from offering proof on remand of facts that might prove the exception to the general rule based on Andersen's conduct. We express no opinion concerning the merits of such a claim, which alleges a factual theory that is independent of the legal theory the trial court resolved and that we review in this opinion." (*Edwards, supra,* 44 Cal.4th at p. 955, fn. 7.)[7] We likewise express no opinion on the matter.

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[7] As we did in our initial opinion, we reject Edwards's contention that Andersen's conduct constituted an independently wrongful act because it violated Labor Code section 432.5. Section 432.5 provides: "No employer, or agent, manager, superintendent, or officer thereof, shall require any employee or applicant for employment to agree, in writing, to any term or condition which is known by such employer, or agent, manager, superintendent, or officer thereof to be prohibited by law." Violation of Labor Code section 432.5 is a misdemeanor. (Lab. Code, § 433.) Penal statutes are strictly construed. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 92; *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 312-313; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 429.) Labor Code section 432.5 is such a statute, in that violation is punishable by imprisonment in a county jail not exceeding six months, by a fine not exceeding $1,000, or both. (Lab. Code, § 23.) By its express terms, Labor Code section 432.5 applies only where the term or condition is "prohibited by law." Labor Code section 2804 makes a contract to waive indemnity rights "null and void." "Void" means "of no legal effect; null." (Black's Law Dictionary (8th ed. 2004) p. 1604.) "Prohibit" means "to forbid by law." (*Id.* at p. 1248.) Labor Code section 2804 does not "forbid" a purported waiver of an employee's indemnity

c. *The TONC's nondisparagement provision did not violate Labor Code section 1102.5.*

As in our initial opinion, we disagree with Edwards that the TONC's nondisparagement provision was void as against public policy. Paragraph 1(c) of the TONC provided: "Employee shall not disparage [Andersen] or any of its affiliated firms or any of their respective present or former partners, managers or employees ('AA Party'); provided, however, that this Section 1(c) shall not prevent Employee from (i) responding to comments made by any AA Party about Employee if Employee reasonably believes such comments were disparaging to Employee or (ii) making statements about an AA Party in connection with the defense of a claim made against Employee by a third party." (Underscoring in original omitted.)

Labor Code section 1102.5 provides in pertinent part: "An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." (Lab. Code, § 1102.5, subd. (a).) Subdivision (b) of the statute prohibits retaliation against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe the information discloses a violation of state or federal law.

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rights; it makes such a waiver void as against public policy. Thus, although conditioning employment on an employee's purported waiver of his or her Labor Code section 2802 indemnity rights would be contrary to law (cf. *Edwards, supra,* 44 Cal.4th at pp. 951-952), such a waiver is not "prohibited" within the narrow meaning of Labor Code section 432.5.

The trial court concluded that the TONC's nondisparagement clause was not unlawful, in that it did not require any illegal conduct on Edwards's part, did not preclude him from responding to governmental inquiries, and did not preclude him from reporting crimes to the government.

The trial court was correct. Nondisparagement clauses appear to have become fairly common, both to protect employers and employees when an employment relationship ends. (See *E.E.O.C. v. Severn Trent Services, Inc.* (7th Cir. 2004) 358 F.3d 438, 440; *Cooper Tire & Rubber Co. v. Farese* (5th Cir. 2005) 423 F.3d 446, 457.) Certainly, we discern nothing inherently unlawful about one party generally agreeing not to disparage another.

On the other hand, to the extent a nondisparagement clause can be understood to prohibit truthful comments, it cannot hinder an employee's cooperation with government officials. For example, such an agreement cannot trump a subpoena. (*E.E.O.C. v. Severn Trent Services., Inc., supra,* 358 F.3d at pp. 442-443 [suits attempting enforcement of nondisparagement clauses as against government subpoenas would be "beyond frivolous; they would be obstructions of justice"].) Further, attempted enforcement of such an agreement to prevent employees from voluntarily approaching a government or law enforcement agency to report a violation of law as delineated in Labor Code section 1102.5 would be against public policy. (See *Cooper Tire & Rubber Co. v. Farese, supra,* 423 F.3d at p. 457 ["Arguably, it would be against public policy for an employer to sue a former employee for violating a nondisparagement clause by disclosing the employer's illegal activities"].) Labor Code section 1102.5 "reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 77; *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1301-

1302, fn. 1.) Indeed, an uncodified preamble to a 2003 amendment to Labor Code section 1102.5[8] provides: "The Legislature finds and declares that unlawful activities of private corporations may result in damages not only to the corporation and its shareholders and investors, but also to employees of the corporation and the public at large. The damages caused by unlawful activities may be prevented by the early detection of corporate wrongdoing. The employees of a corporation are in a unique position to report corporate wrongdoing to an appropriate government or law enforcement agency. [¶] The Legislature finds and declares that it is the public policy of the State of California to encourage employees to notify an appropriate government or law enforcement agency when they have reason to believe their employer is violating laws enacted for the protection of corporate shareholders, investors, employees, and the general public." (Stats. 2003, ch. 484, § 1; see generally *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 925 [an uncodified section is part of the statutory law and may be used as an aid in construing a statute].)

Despite the strong public policies which Labor Code section 1102.5 was clearly meant to vindicate and the breadth of the nondisparagement provision at issue, we conclude Labor Code section 1102.5 has no application here. This is not an action to enforce an overbroad, nondisparagement agreement, and there is no claim Edwards was retaliated against for disclosing information. By its plain language, Labor Code section 1102.5 only prohibits an employer from making, adopting, or enforcing any "rule, regulation, or policy preventing an employee from disclosing information . . . ." (Lab. Code, § 1102.5, subd. (a).) The TONC

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[8] Labor Code section 1102.5 was amended in 2003 "to add a number of whistleblower-related provisions and additional penalties." (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 329, fn. 5; Stats. 2003, ch. 484, §§ 2, 7.)

provision cannot reasonably be described as a rule, regulation, or policy within the meaning of the statute. A "policy" is a " 'settled or definite course or method adopted and followed by a government, institution, body, or individual.' " (*Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal.2d 481, 485-486 [construing identical "rule, regulation or policy" language contained in Labor Code section 1101].) A rule is defined as, inter alia, a "prescribed, suggested, or self-imposed guide for conduct or action: a regulation or principle" and "an accepted procedure, custom or habit having the force of a regulation." (Webster's 3d New Internat. Dict. (2002) p. 1986.) A "regulation" is "an authoritative rule or principle dealing with details of procedure." (*Id.* at p. 1913.)

In short, Labor Code section 1102.5, subdivision (a) refers to workplace rules and regulations meant to govern employees' conduct. The TONC, on the other hand, was an instrument proposed at the end of Edwards's tenure with Andersen, and did not constitute a rule or policy governing his conduct as an Andersen employee. By allegedly insisting Edwards sign the TONC as a condition of hire with HSBC, Andersen did not violate Labor Code section 1102.5. As a matter of law, inclusion of the nondisparagement provision in the TONC did not constitute an independently wrongful act for purposes of Edwards's intentional interference with prospective economic advantage claim.

2. *Whether there was a prospective economic relationship between HSBC and Edwards, and whether HSBC or Andersen required the TONC as a condition of Edwards's employment, were questions of fact.*

In its briefing before this court, Andersen asserted that we might uphold the trial court's ruling dismissing Edwards's intentional interference claim for two independent reasons: (1) that Edwards could not satisfy the first element of the claim, i.e., he lacked a prospective economic relationship with HSBC; and (2) that HSBC, not Andersen, insisted on releases from the noncompetition agreement before hiring Andersen personnel. Both these contentions turn upon disputed

issues of material fact and were therefore properly denied on summary adjudication by the trial court.

Summary judgment or adjudication is granted when a moving party establishes the absence of a triable issue of material fact and the right to entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Pacific Shore Funding v. Lozo* (2006) 138 Cal.App.4th 1342, 1348-1349.) We review the trial court's decision de novo. (*Pacific Shore Funding v. Lozo, supra,* at p. 1349; *Nathanson v. Hecker* (2002) 99 Cal.App.4th 1158, 1162; *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 589.)

a. *Whether Edwards had a prospective economic relationship with HSBC turned on the resolution of triable issues of material fact.*

As noted *ante,* the first element of an intentional interference with prospective economic advantage claim is " ' "an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff . . . ." ' " (*Korea Supply Co. v. Lockheed Martin Corp., supra,* 29 Cal.4th at p. 1153; *Edwards, supra,* 44 Cal.4th at p. 944; *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 521-522.) "The law precludes recovery for overly speculative expectancies by initially requiring proof the business relationship contained ' "the *probability* of future economic benefit to the plaintiff." ' [Citations.] 'Although varying language has been used to express this threshold requirement, the cases generally agree it must be reasonably probable that the prospective economic advantage would have been realized but for defendant's interference.' [Citation.]" (*Westside Center Associates v. Safeway Stores 23, Inc., supra,* at p. 522.) "[T]he interference tort applies to interference with *existing* noncontractual relations which hold the promise of future economic advantage. In other words, it protects the expectation that the relationship eventually will yield the desired benefit, not necessarily the more speculative expectation that a potentially beneficial relationship will eventually arise." (*Id.* at p. 524, fn. omitted.)

The trial court held that "there is a sufficient relationship between plaintiff and HSBC for purposes of this claim (indeed, the mere fact that an offer was made triggered plaintiff's termination)." The trial court was correct. There was evidence from which a jury could find Edwards's relationship with HSBC was not speculative. It was certainly more than a hope: HSBC was slated to employ the personnel of Andersen's Los Angeles tax practice. A memorandum of understanding between HSBC and Andersen listed Edwards as an employee HSBC intended to hire. Andersen cited no authority persuading us that a conditional employment offer like the one here could not qualify as an existing relationship.

Nor did the timing of the employment offer preclude a finding of an existing relationship. To prove the existing relationship prong, the relationship must have existed at the time of the defendant's allegedly tortious acts, "lest liability be imposed for actually and intentionally disrupting a relationship which has yet to arise. [Citation.]" (*Westside Center Associates v. Safeway Stores 23, Inc., supra*, 42 Cal.App.4th at p. 526.) Andersen argued that it imposed the TONC on June 18, 2002, *before* Edwards received the first letter offering him employment with HSBC on June 27. But the evidence cited -- in one case an e-mail message dated June 18, 2002 -- established that it was already contemplated, indeed expected, that the employees would be "begin[ing] employment" with a "new employer," and extensive procedures had already been put into place to facilitate that transition. HSBC's first offer letter to Edwards was dated simply "June, 2002." Further, Edwards persuasively argues that Andersen's wrongful conduct is not defined solely by the delivery of the TONC, but instead encompassed a series of actions that ultimately resulted in HSBC's revoking his employment offer. Because triable issues of material fact exist, the trial court properly denied summary adjudication on the intentional interference with prospective economic advantage claim.

b. *Whether Andersen or HSBC required Edwards to sign the TONC in order to be hired by HSBC presents a triable issue of material fact.*

The trial court also apparently rejected Andersen's argument that HSBC, rather than Andersen, required Edwards to execute the TONC as a condition of employment. The trial court was correct; this issue turns on disputed issues of material fact.

The TONC stated that Andersen and WTAS had "entered into an agreement which provides, in part, that [WTAS] shall offer employment to Employee." It further provided, "completing the transactions contemplated by" the WTAS agreement "at this time maximizes value for the benefit of [Andersen], *which benefit may not be realized without Employee separating from [Andersen] on the terms set forth in [the TONC] and affiliating with*" WTAS. (Italics added.)

Evidence in the record shows Andersen, not HSBC, proposed and generated the TONC. Andersen admits it drafted the TONC. One of the "conditions to closing" recited in the acquisition agreement between Andersen, WTAS, and HSBC was that "each Restricted Employee shall have delivered to Andersen a duly executed copy of the Termination of Non-Compete Agreement." HSBC's counsel testified at her deposition that, "We required a release. To the extent there was other information or conditions in the form, it was not our requirement." She further testified the TONC was "Andersen's form. . . . this was a form that they had used in prior transactions and that it had already been negotiated to the extent Andersen would agree to any changes and that the rest of it was nonnegotiable." HSBC's counsel "understood that with respect to provisions within [the TONC] that didn't affect HSBC, they were nonnegotiable." HSBC's "concern and only concern was that the employees be released from their restrictive covenants. To the extent there were other provisions in the document provided they didn't have any impact on HSBC, we didn't need to have those provisions in the document." Andersen's president and chief operating officer testified that Andersen desired to maximize its return on all its assets, and that the

noncompetition covenants had economic value. An Andersen internal memorandum informed employees that "[i]n order for you to begin employment at your new employer we must first terminate your employment with Andersen." The memorandum then explained that one of the steps required to "terminate you in the Andersen system" was execution of the TONC.

From this evidence, a jury could infer that the TONC requirement was included in the purchase agreement by Andersen, not HSBC. Andersen points to no undisputed evidence establishing that the TONC was mandated by HSBC rather than Andersen. Given this state of affairs, it is a disputed issue of fact whether Andersen extracted from HSBC a promise not to hire any Andersen employee unless that employee executed the TONC. Because triable issues of material fact exist, the trial court properly denied summary adjudication on the intentional interference with prospective economic advantage claim.

3. *The Cartwright Act cause of action.*

The trial court granted Andersen's demurrer to Edwards's Cartwright Act claim on the grounds Edwards lacked standing to bring the claim. "When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal.4th at p. 1141.) "If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]" (*Schifando v. City of Los Angeles, supra,* at p. 1081.) A judgment of dismissal after a demurrer

will be sustained if proper on any ground stated in the demurrer. (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324; *Lee v. Bank of America* (1990) 218 Cal.App.3d 914, 919.)

a. *Discussion.*

The Cartwright Act prohibits combinations in restraint of trade. (*Vinci v. Waste Management, Inc.* (1995) 36 Cal.App.4th 1811, 1814.) The Act prohibits every trust, defined, as pertinent here, as a combination of capital, skill, or acts by two or more persons for specified anticompetitive purposes, including to create or carry out restrictions in trade or commerce. (§§ 16720, 16726; *State of California ex rel. Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147, 1152.) Anyone who is injured in his or her business or property by reason of anything forbidden by the Act may sue under the Act. (*Vinci v. Waste Management, Inc., supra,* at p. 1814.) Edwards's Cartwright Act theory was that Andersen's and HSBC's agreement that HSBC would not hire any employee who failed to execute the TONC, operated to restrain the labor market of which Edwards was a member. Thus, under Edwards's theory, as a direct victim of this employment boycott, he had standing to sue under the Cartwright Act and the trial court erred by granting Andersen's demurrer.

We need not reach the question of whether Edwards had standing to bring the claim, however. Apart from whether the standing issue was correctly decided, the trial court's ruling was correct for a different reason: The Cartwright Act does not apply to the sale of one business to another. (*State of California ex rel. Van de Kamp v. Texaco, Inc., supra,* 46 Cal.3d at p. 1163.) After tracing the history and development of the Cartwright Act, the *Texaco* court concluded, "Given this history, we must conclude that the drafters intended that their Act apply, as its words had been construed, only to entities that 'combine,' in the sense of those who *perdure* (i.e., continue as separate, independent, competing entities during and after their collusive action) – and therefore that the drafters did not intend the Cartwright Act to regulate the bona fide purchase and sale of one firm by

another." (*Ibid.*; see also *id.* at p. 1168 [drafters of the Cartwright Act "did not intend the Cartwright Act to apply to a purchase and sale agreement, or a merger, between otherwise competing firms"].)

Edwards's complaint alleged that Andersen sold its Los Angeles tax practice to HSBC. The demurrer was therefore proper. "A general demurrer will be sustained where the complaint makes conclusory allegations of a combination and does not allege with factual particularity that separate entities maintaining separate and independent interests combined for the purpose to restrain trade." (*Freeman v. San Diego Assn. Of Realtors* (1999) 77 Cal.App.4th 171, 189.) Although the trial court asserted a different basis for its ruling, "[i]t is the validity of the court's action in sustaining a demurrer, not its reasons, which is reviewable. [Citation.]" (*Lee v. Bank of America*, *supra*, 218 Cal.App.3d at p. 919; *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517.) Nothing in the record suggests that, had leave to amend been granted, Edwards would have been able to cure the fundamental defect in his Cartwright Act claim. Thus, the trial court properly granted Andersen's demurrer to Edwards's Cartwright Act cause of action.

DISPOSITION

The order sustaining, without leave to amend, Andersen's demurrer to the Cartwright Act cause of action is affirmed. The judgment in favor of Andersen is

otherwise reversed, and the matter is remanded for further proceedings consistent with the opinions expressed herein. Each party shall bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.